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No. 04-347

Supreme Court, U.S.
FILED
OCT 14 2004
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

HERERO PEOPLE'S REPARATION CORPORATION, *et al.*,

Petitioners,

v.

DEUTSCHE BANK, A.G., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENT DEUTSCHE BANK, A.G.

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QUESTIONS PRESENTED

1. Should this Court issue an advisory opinion "clarif[ying]" whether a private right of action exists under federal common law for violations of customary international law, when Petitioners did not raise this question below and do not contend their complaint stated such a claim?

2. Did the courts below err by following the firmly established rule that when a well-pleaded complaint expressly seeks recovery under federal law, its failure to state a valid federal claim does not deprive the District Court of subject matter jurisdiction?

STATEMENT PURSUANT TO RULE 29.6

Deutsche Bank, A.G. ("Deutsche Bank") has no parent company. To Deutsche Bank's knowledge and belief, no public company has reported owning 10 percent or more of the stock of Deutsche Bank.

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Respondent Deutsche Bank, A.G. ("Deutsche Bank") respectfully requests that the Supreme Court deny the petition of the Herero People's Reparation Corporation and individual members of the Herero Tribe of Namibia (collectively, "Petitioners" or "the Herero") for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit.

STATEMENT OF THE CASE

Petitioners filed this action in the Superior Court of the District of Columbia on June 13, 2001. In their First Amended Complaint (the "Amended Complaint"), Petitioners alleged that Deutsche Bank participated, in some unspecified way, in atrocities perpetrated against the Herero between 1890 and 1915 during Imperial Germany's colonization of South West Africa, now Namibia. The one-count Amended Complaint expressly alleged violations arising under, *inter alia*, "United States law" and "international law." (Am. Compl. at 21.)

Deutsche Bank, together with its co-defendants Terex Corporation and Woermann Line, timely removed the action to the United States District Court for the District of Columbia pursuant to 28 U.S.C. § 1441.[1] The Notice of Removal stated that the grounds for removal were the Amended Complaint's express allegations that Petitioners' claims arose under, *inter alia*, "United States law" and "international law," which gave rise to federal question jurisdiction pursuant to 28 U.S.C. § 1331. (Pet. at 7-8.)

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1. Petitioners later withdrew their claim against Terex Corp. (Pet. App. B at 8a, n.1.) The District Court dismissed Petitioners' claim against Woermann Line for lack of personal jurisdiction. (*Id.* at 8a, n.2.)

On October 1, 2001, Petitioners filed a "Motion to Remand the Case Pursuant to the First Sentence of 28 USC § 1447(c)" (the "Remand Motion"). That sentence provides that a motion to remand on grounds *"other than lack of subject matter jurisdiction"* must be filed within 30 days after removal. 28 U.S.C. § 1447(c) (2004) (emphasis added). In their accompanying memorandum of law, Petitioners conceded that federal question jurisdiction existed under 28 U.S.C. § 1331, and cited the Alien Tort Statute, 28 U.S.C. § 1350, as an additional potential source of federal jurisdiction. (Pls.' Mem. in Supp. of Remand Motion at 2 & n.3.) The Herero nevertheless sought a remand on the ground that the Notice of Removal was technically deficient in that it failed to describe the basis of federal jurisdiction in sufficient detail. (Pet. App. C at 39a.)

The District Court denied the Remand Motion in a Memorandum Opinion filed May 30, 2002. (Pet. App. C.) The District Court held that the Notice of Removal sufficiently identified the grounds of federal jurisdiction, satisfying 28 U.S.C. § 1446(a). (*Id.* at 41a-43a.) The District Court also independently confirmed that federal jurisdiction existed, based on the Amended Complaint's express reliance on "United States law" and "international law." (*Id.*)

While the Remand Motion was pending, Deutsche Bank (and, separately, Woermann Line) moved to dismiss the Amended Complaint on several grounds. In their briefs opposing these motions to dismiss, Petitioners clarified the basis for the action. The Herero asserted that the Amended Complaint "is unequivocal. It asserts, *inter alia*, that defendants have violated international law . . . ." (Pls.' Opp. to Deutsche Bank's Mot. to Dismiss at 8.) Petitioners expressly repudiated the Alien Tort Statute as the basis for

their claim. (Pet. App. A at 3a, n.1.) Instead, in the course of arguing that the action was not time-barred, Petitioners asserted that "international law, operating through the federal common law, provides both the cause of action and the associated prescription rule." (Pet. App. B at 27a.) However, as the District Court noted and as Petitioners later conceded in the Court of Appeals, Petitioners neither argued nor cited any authority establishing that the federal common law established a private right of action for violations of customary international law. (Pet. App. B at 27a; Oral Argument Tr. at 12 (Apr. 2, 2004).)

The District Court correctly noted that Petitioners did not assert any claims under the Alien Tort Statute or the Torture Victim Protection Act, Pub. L. 102-256, 106 Stat. 73 (enacted Mar. 12, 1992) (codified as Note to 28 U.S.C. § 1350), but brought their lone claim under the federal common law. (Pet. App. B at 25a-26a; *id.* at 26a, n.16.) Relying on District of Columbia Circuit precedent, relevant cases decided by other federal courts of appeals, and the Restatement (Third) of Foreign Relations of the United States, the District Court refused to infer the existence of a federal common law cause of action for violations of customary international law. (*Id.* at 33a.) The District Court therefore held that Petitioners had failed to state a valid cause of action, and granted Deutsche Bank's Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). (*Id.*; *see also id.* at 36a.)

In the Court of Appeals, Petitioners did not raise the question they invite this Court to "clarif[y]" on certiorari: whether a federal common law action exists for violations of customary international law. (Pet. at 4.) Instead of challenging the District Court's decision on the merits,

Petitioners renewed their argument that the Notice of Removal was technically deficient. Petitioners also argued for the first time on appeal that subject matter jurisdiction was lacking, and that therefore the case should have been remanded to Superior Court.

Petitioners' jurisdictional argument took two forms. First, Petitioners argued that once the District Court determined that the Amended Complaint failed to assert a valid federal claim, federal subject matter jurisdiction did not exist. This argument was clearly untenable under a long line of well-settled Supreme Court precedents. *See, e.g., Bell v. Hood*, 327 U.S. 678 (1946). *Bell* and its progeny hold that when a well-pleaded complaint asserts a non-frivolous claim under federal law, the complaint's failure to state a valid theory of recovery results in dismissal on the merits – not for lack of federal jurisdiction. *See id.* at 682-83. At oral argument in the Court of Appeals, Petitioners ventured their second jurisdictional argument, claiming that their federal common law claim was so "insubstantial" that under *Bell*, the action should have been dismissed on jurisdictional grounds. (Tr. at 12.)

The Court of Appeals disagreed, and affirmed the District Court's holding that it had jurisdiction to decide Petitioners' claim on the merits. (Pet. App. A.) The Court of Appeals held that the Amended Complaint alleged at least an arguable claim under federal common law and the Alien Tort Statute. (*Id.* at 6a.) Because this claim was not "wholly insubstantial and frivolous," *cf. Bell*, 327 U.S. at 682-83, the Court of Appeals held that the action was properly dismissed on the merits rather than remanded for lack of jurisdiction. (Pet. App. A at 6a.) The Court of Appeals was not asked to decide, and did not address, whether a federal cause of action

exists for violations of customary international law, except to say that Petitioners' attempt to assert such a claim was "nonfrivolous." (*Id.*)

On September 9, 2004, the Herero filed the instant Petition for a Writ of Certiorari (the "Petition").

SUMMARY OF THE ARGUMENT

The first question presented in the Petition is whether this Court should "clarif[y]" whether the federal common law provides a private right of action for alleged violations of customary international law. (Pet. at *i*, 4.) By failing to raise this question in the Court of Appeals, Petitioners waived and abandoned any right to raise it here. Petitioners never appealed the dismissal of their claim on the merits. Even now, as they seek "clarification" of the abstract question set forth in the Petition, Petitioners do not assert that the Amended Complaint actually stated a valid federal claim. They merely ask this Court to "dispel the confusion and the uncertainty" in this area of the law. (Pet. at 6.) But this Court does not issue advisory opinions. Because Petitioners did not challenge the dismissal of their claim in the Court of Appeals, and because even now Petitioners do not affirmatively ask this Court to reverse that dismissal (but merely to clarify the law), the first question presented by the Petition is non-justiciable and lies beyond this Court's permissible constitutional authority.

The second question presented by the Petition raises no unsettled or substantial issues of federal law. Petitioners challenge the District Court's denial of their motion to remand the action to the Superior Court of the District of Columbia. They appear to renew their argument that

Respondents' Notice of Removal was technically deficient – a claim that is not only incorrect but that has no ramifications beyond this case. Petitioners also argue that once the District Court determined that the Amended Complaint failed to state a valid federal claim, the action should have been remanded to Superior Court. That argument is foreclosed by decades of well-settled precedent holding that unless a purported federal claim is "wholly insubstantial and frivolous" – which the Petition does not contend – the correct procedural outcome is dismissal on the merits, and not for lack of jurisdiction. *See, e.g., Bell v. Hood*, 327 U.S. 678, 682-83 (1946). Petitioners' rhetoric about "comity" and the "dignitary interests" of the states (Pet. at 6, 10), moreover, rings hollow in light of their failure to identify any theory of recovery that they might pursue under state law (or local District of Columbia law). Indeed, a remand would make no sense in this case: Petitioners have never argued that the Amended Complaint asserted a supplemental state law claim,[2] and their only asserted federal claim was dismissed on the merits – a ruling that was unchallenged on appeal and is not challenged here. There is, accordingly, nothing left to be remanded. The petition should be denied.

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2. Although the Amended Complaint refers to "District of Columbia law" as well as "United States law" and "international law" (Am. Compl. at 21), Petitioners have disavowed any reliance on District of Columbia law. In the District Court, while arguing against the application of a statute of limitations borrowed from District of Columbia law, Petitioners asserted that their "claim sounds in international law." (Pls.' Opp. to Mot. to Dismiss of Def. Woermann Line at 15.) Attempting to distinguish cases cited by Respondents in support of their limitations argument, Petitioners argued that none of those cases "involved a claim *exclusively* invoking the federal common law." (*Id.* at 16 (emphasis added).) As the District Court noted, this was an implicit concession that Petitioners based their claim "exclusively" on the federal common law. (Pet. App. B at 26a, n.16.)

REASONS FOR DENYING THE PETITION

Neither of the two questions presented in the Petition merits review. The first was not argued in the Court of Appeals, and thus has been waived and abandoned. The second is foreclosed by a long line of well-settled precedents in this Court and the lower federal courts.

First, the Petition asks the Court to consider "[w]hether there is a private right of action recognized in federal courts for violation of fundamental principles of international law." (Pet. at *i*.) The District Court correctly held that Petitioners failed to state such a claim, and that ruling was not challenged on appeal. Petitioners nevertheless suggest that the decision of the Court of Appeals "invites clarification by this Court of the existence of a private cause of action for violations of customary international law." (Pet. at 4 (capitalization omitted).) Because this issue was not raised below, it should not be considered on certiorari.

Petitioners did not argue in the Court of Appeals that federal law created a private right of action for violations of customary international law. Nor did they argue that the Amended Complaint stated such a claim. Quite the opposite is true. In their attempt to defeat federal jurisdiction, Petitioners affirmatively argued that their purported federal claim for violations of customary international law met the "wholly insubstantial and frivolous" standard set forth in *Bell*, 327 U.S. at 682-83. (Tr. at 12.) Even now, in the Petition, the Herero do not argue that the Amended Complaint stated a valid federal claim, but only that the conceded absence of such a claim should have led to a remand rather than dismissal on the merits. Thus, the Petition is not an appropriate vehicle for this Court to consider the existence

of a federal right of action for violations of international norms, nor to issue a "clarification" concerning such a right of action. Petitioners neither preserved the issue for review nor developed an adequate record for this Court to consider. Moreover, because Petitioners themselves concededly did not assert any valid claim under federal law, any such "clarification" by this Court would be an improper and unconstitutional advisory opinion.

The second question presented fares no better. Petitioners ask whether, in light of their failure to plead a valid federal claim, the Amended Complaint should have been remanded to Superior Court for lack of subject matter jurisdiction. (Pet. at *i*, 6.) That argument is foreclosed by well-settled precedent, applied correctly by the courts below, and raises no substantial issues of federal law.

I. PETITIONERS' CLAIM THAT A PRIVATE RIGHT OF ACTION EXISTS FOR VIOLATIONS OF CUSTOMARY INTERNATIONAL LAW WAS NOT RAISED IN THE COURT OF APPEALS

Petitioners raised three questions in the Court of Appeals: (1) whether the District Court erred by denying the Remand Motion, *discussed infra*, Part II; (2) whether the District Court erred by denying leave to amend the Amended Complaint; (3) and whether the District Court erred by dismissing the Amended Complaint as to Woermann Line for lack of personal jurisdiction. (Appellants' Br. at 1.) Petitioners did not argue that the District Court erred in holding that there was no federal common law cause of action for violations of customary international law. They did not urge the Court of Appeals to recognize such a cause of action. They did not contend that the Amended Complaint asserted a valid federal claim.

To the contrary, the Herero began their appeal by tacitly conceding their failure to state a valid federal claim, and ended their appeal by affirmatively arguing that position. In their opening brief, for example, the Herero asserted that the District Court erred "by failing to conclude that the absence of a private right of action was jurisdictional" – but not by concluding that no such right of action existed. (Appellants' Br. at 13.) This was the major theme of Petitioners' appeal: "In the absence of a private right of action, . . . the federal court lacks subject matter jurisdiction." (*Id.* at 21; *see also id.* at 14, 17-18 & 22; Appellant's Reply Br. at 1; Tr. at 15.)

This implicit recognition that the Amended Complaint failed to state a valid federal cause of action was made explicit at oral argument, when Petitioners' counsel argued that jurisdiction was lacking under *Bell v. Hood*'s "wholly insubstantial and frivolous" standard. *Bell*, 327 U.S. at 682-83. While avoiding the word "frivolous," Petitioners' counsel argued that their purported federal claim was insubstantial enough to defeat federal jurisdiction:

> [W]e're in the odd position of being a plaintiff saying the theory here is an insubstantial theory . . . . From plaintiffs' point of view, from the point of view of plaintiffs in human rights cases, it will be nice if we can marshal some authority to support the proposition that violations of international law carry with them rights of actions. We haven't asserted that affirmatively. We didn't marshal any authority.

(Tr. at 12.)

Having failed to argue in the Court of Appeals that the federal common law provides a private right of action for violations of customary international law, and having expressly argued the contrary position, the Herero are not permitted to seek "clarification" of that point in the Supreme Court. "Where issues are neither raised before nor considered by the Courts of Appeals, this Court will not ordinarily consider them." *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 148 n.2 (1970) (citations omitted). *See also Kentucky v. Stincer*, 482 U.S. 730, 747 n.22 (1987) (explaining that "only in exceptional cases" will the Supreme Court "consider questions urged by a petitioner or appellant not pressed or passed upon in the courts below") (citation and internal quotation marks omitted); *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 237 (1990) (citations omitted). *See also Yee v. City of Escondido*, 503 U.S. 519, 533 (1992) (refusing to consider petitioners' claims that were not raised or addressed below). Petitioners' failure to argue that the Amended Complaint stated a valid federal claim meant that the Court of Appeals did not pass on the issue. As a consequence, the record does not squarely present the facts, precedents, and legal arguments necessary for the Supreme Court to consider carefully the question presented. *See Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 79 (1988) (explaining that the Court's policy of not considering questions that were not raised below reflects "a constellation of practical considerations, chief among which is our own need for a properly developed record on appeal.")

There is yet another fatal flaw in Petitioners' request for "clarification" of the existence of a private right of action for violations of international norms: the Petition does not assert that the Amended Complaint stated such a claim. The Herero urge a more abstract proposition: that granting

the Petition "will provide the Court with an opportunity to dispel the confusion and the uncertainty which permeates federal judicial treatment of claims sounding in fundamental violations of international law." (Pet. at 6.)

In this respect, Petitioners seem to be confessing that they were confused by this Court's recent ruling in *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739 (2004). In *Sosa*, the Court recognized that a limited class of actions alleging violations of customary international law may be brought under the Alien Tort Statute, 28 U.S.C. § 1350. Citing *Sosa*, Petitioners argue that "the Herero claims of slavery and of genocide each implicate a 'norm of customary international law so well defined . . .' that the contours of a private right of action can be charted with illumination by this Court." (Pet. at 5 (quoting *Sosa*, 124 S. Ct. at 2769).) Yet Petitioners fail to point out that they expressly disavowed any reliance upon the Alien Tort Statute. (Pet. App. A at 3a, n.1.) *Sosa* is thus entirely irrelevant to their Petition.

In the context of this case, any "clarification" of whether a federal cause of action exists for international law violations would constitute an improper advisory opinion Petitioners did not argue in the Court of Appeals, and do not assert in the Petition, that the Amended Complaint stated a valid claim for violations of international law. Having expressly disavowed any such argument in the Court of Appeals, and having argued that their purported federal claim was "wholly insubstantial and frivolous," Petitioners would not benefit from the "clarification" they seek. Thus, the requested "clarification" would amount to an improper advisory opinion, in violation of Article III limitations and this Court's established practice. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101 (1998) (affirming that advisory opinions have been "disapproved by this Court from the beginning") (citations omitted). There is no reason to depart from that practice now.

II. THE LOWER COURTS, APPLYING NEARLY SIX DECADES OF UNBROKEN PRECEDENT, CORRECTLY RETAINED JURISDICTION

Petitioners contend that once the District Court determined that they had failed to plead a valid federal claim, that court should have remanded the case for want of subject matter jurisdiction. (Pet. at *i*.) They also appear to renew their argument that the Notice of Removal was technically deficient. (*Id.* at 7-9.) Both arguments are patently incorrect, and neither merits review by this Court.

A. Settled Law Precludes Petitioners' Argument That Their Failure To Plead A Valid Federal Claim Mandated A Remand For Lack Of Subject Matter Jurisdiction

Petitioners contend that the District Court erred by dismissing this action on the merits under Rule 12(b)(6). In their fundamentally misguided view: "In the absence of a private right of action, . . . the federal court lacks subject matter jurisdiction." (Pet. at 12.)

This argument is foreclosed by nearly sixty years of precedent holding that the precise opposite is true: a well-pleaded complaint that invokes federal law is subject to the federal courts' jurisdiction, unless the asserted claim is "wholly insubstantial and frivolous." *See Bell*, 327 U.S. at 682-83. That remains true even if the District Court ultimately finds that the plaintiff failed to allege a valid federal claim. *See id.* As this Court held in *Steel Co.*:

> It is firmly established in our cases that the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction, *i.e.*, the courts' statutory or constitutional *power* to adjudicate the case.

Steel Co., 523 U.S. at 89 (citations omitted) (italics in original). As *Bell* explains, there is sound reason for the federal courts' retaining jurisdiction over non-meritorious federal claims:

> [T]he court must assume jurisdiction to decide whether the allegations state a cause of action on which the court can grant relief . . . Jurisdiction, therefore, is not defeated . . . by the possibility that the averments might fail to state a cause of action.

Bell, 327 U.S. at 682. Thus, the jurisdictional inquiry does not turn on whether the plaintiff's claim is valid, but only on whether it is arguably valid, i.e., not "wholly insubstantial and frivolous." *See id.* at 682-83. As *Steel Co.* teaches:

> [T]he district court has jurisdiction if the right of the petitioners to recover under their complaint will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another, unless the claim clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous.

523 U.S. at 89 (citations omitted). *Accord Verizon Maryland Inc. v. Public Serv. Comm'n*, 535 U.S. 635, 643 (2002). This principle is so uncontroversial that it has become hornbook law. *See* Jack H. Friedenthal et al., *Civil Procedure* § 2.4 (3d ed. 1999) (explaining that a "claim may be dismissed for failure to state a claim on which relief can be granted, and yet be substantial enough to support federal jurisdiction") (footnotes and citations omitted).

The rule in *Bell* has been routinely and repeatedly applied in cases removed from state court. *See, e.g., Albingia Versicherungs A.G. v. Schenker Int'l Inc.*, 344 F.3d 931, 936 (9th Cir. 2003), *amended on rehearing*, 350 F.3d 916 (9th Cir. 2003), *cert. denied*, 124 S. Ct. 2162 (2004); *Hawkins v. National Ass'n of Sec. Dealers Inc.*, 149 F.3d 330 (5th Cir. 1998); *Pueblo Int'l, Inc. v. De Cardona*, 725 F.2d 823, 825-26 (1st Cir. 1984) (Breyer, C.J.). *Albingia* is instructive. The complaint alleged a violation of the Warsaw Convention; after removal, the purported federal claims were dismissed on the merits, but the District Court retained supplemental jurisdiction over the plaintiffs' state law claims. The Court of Appeals affirmed, holding that "[j]urisdiction existed because the pleading asserted, without frivolousness, that the Warsaw Convention gave Albingia a claim." *Albingia*, 344 F.3d at 936.

Federal jurisdiction exists in this case because under one reading of the federal common law – urged by Petitioners in the District Court – there is a private right of action for violations of customary international law. Under the contrary view, adopted by the District Court and unchallenged on appeal, the federal common law does not create any such cause of action. Federal courts have the power to decide whether a federal cause of action exists, and they do not lose jurisdiction if they determine that the asserted claim is not valid.

In any event, a remand would make no sense in this case (unlike, perhaps, *Albingia*), as Petitioners do not argue that the Amended Complaint states a supplemental claim under state law (or District of Columbia law). Thus, the only claim that could conceivably be remanded is the federal common law claim that the District Court held was not a valid cause

of action. It is also a claim governed by federal, not state, law. *See Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 424-27 (1964); *Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227, 1232-33 (11th Cir. 2004). Petitioners are not entitled to re-argue the merits of their federal claim in the Superior Court of the District of Columbia.

The cases cited by Petitioners are not to the contrary. The Herero cite *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1 (1983) to argue that federal question jurisdiction is limited to cases in which (i) federal law creates the cause of action, or (ii) the plaintiff's claim necessarily turns on a substantial question of federal law. (Pet. at 11-12.) But Petitioners miss the obvious point: federal question jurisdiction exists here precisely because the Amended Complaint asserted a claim under federal law.[3] According to *Franchise Tax Board*, that is enough to sustain federal jurisdiction.

Petitioners nonetheless argue that in the "vast majority" of cases, "[a] suit arises under the law that creates the cause of action." (Pet. at 12 (quoting *Merrell Dow Pharms., Inc. v. Thompson*, 478 U.S. 804, 808 (1986); *American Well Works v. Layne & Bowler Co.*, 241 U.S. 257, 260 (1916)).) From that innocuous premise, Petitioners leap to the unsupported conclusion that their conceded failure to allege a valid federal claim means this action did not "arise under" federal law for jurisdictional purposes.

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3. As noted above, Petitioners argued in the District Court that "international law, operating through the federal common law, provides . . . the cause of action." (Pet. App. B at 27a.) They made the same point at oral argument in the Court of Appeals: "[T]he only basis, as far as any of us has alleged so far, has been the common law incorporation of the international law." (Tr. at 15.)

Apart from its sheer illogic, Petitioners' argument is belied by the case law in three respects. First, this Court has held that the principle relied on by Petitioners – that "[a] suit arises under the law that creates the cause of action," *American Well Works*, 241 U.S. at 260 – is a rule of inclusion, not exclusion. Where federal law does not create the asserted cause of action, federal question jurisdiction may still exist.[4] Second, Petitioners' argument is contrary to *Bell v. Hood's* holding that "[j]urisdiction . . . is not defeated . . . by the possibility that the averments might fail to state a cause of action on which petitioners could actually recover." *Bell*, 327 U.S. at 682. Third, this case falls within the "vast majority" of cases in which the asserted claim is a federal claim. As the courts below held, jurisdiction exists here because the well-pleaded Amended Complaint expressly alleged violations of "United States law" and "international law." (*See* Pet. at 4a; *id.* at 42a-43a.)[5]

4. The *American Well Works* rule is "more useful for describing the vast majority of cases that come within the district courts' original jurisdiction than it is for describing which cases are beyond district court jurisdiction." *Franchise Tax Bd.*, 463 U.S. at 9. The rule "has been rejected as an exclusionary principle." *Id.* (citations omitted).

5. Petitioners also cite two cases in which the Courts of Appeals supposedly held that "there was no federal jurisdiction . . . *because* there was no private right of action." (Pet. at 12 (italics added).) Petitioners misread the cases. In *International Science & Technology Institute, Inc. v. Inacom Communications, Inc.*, 106 F.3d 1146, 1158 (4th Cir. 1997), the plaintiff's claim arose under an unusual federal statute that gave the *state courts* exclusive jurisdiction over private damages actions. And in *Miller v. Norfolk & Western Railway Co.*, 834 F.2d 556, 567-68 (6th Cir. 1987), the federal courts lacked jurisdiction because the plaintiff alleged a garden-variety defamation claim arising under state law, or alternatively, because federal labor laws completely pre-empted the defamation claim and vested sole jurisdiction in a federal administrative panel. Either way, *Miller*, like *International Science*, is inapposite.

B. There Is No Substantial Issue Of Federal Law Concerning The Technical Adequacy Of The Notice Of Removal

Petitioners appear to renew their argument that the Notice of Removal was technically deficient. (Pet. at 7-9.) There is no reason for the Supreme Court to superintend the adequacy of the Notice of Removal – a question without any implications beyond this case. This is not the "rare[]" case warranting Supreme Court review of the lower courts' purported "misapplication of a properly stated rule of law." *Cf.* U.S. Sup. Ct. R. 10.

In any event, the courts below correctly rejected Petitioners' challenge to the adequacy of the notice. The Notice of Removal identified, among the stated grounds for removal, the Amended Complaint's express allegation that Petitioners' claims arose under "United States law" and "international law," giving rise to jurisdiction under 28 U.S.C. § 1331. (Pet. at 7-8.) The Notice of Removal thus easily satisfied the statutory requirement that it "contain[] a short and plain statement of the grounds for removal." 28 U.S.C. § 1446(a) (2004). The District Court held that the notice provided sufficient notice of the grounds for removal (Pet. App. C at 41a-42a), and the Court of Appeals affirmed. The technical sufficiency of the Notice of Removal does not merit the attention of this Court.

C. The Decision Below Does Not Offend Principles of "Comity"

Petitioners urge review of the Court of Appeals' affirmance of the District Court's denial of remand, citing "principles of comity with coequal state courts." (Pet. at 6.) They assert that the Court of Appeals' decision is somehow

an affront to "the states' dignitary interests in presiding over claims appropriate for state court resolution." (Pet. at 10.) But no state is involved in this case; Petitioners filed the action in the District of Columbia, which does not implicate the same considerations of comity as do the 50 states. Moreover, Petitioners' rhetoric about comity and dignity cannot overcome the simple fact that their sole claim was a federal common law claim. (*See* Note 2, *supra*.) The Petition does not assert that the Amended Complaint alleged a cause of action sounding in state law (or District of Columbia law). Thus, even if the federal seat of government were entitled to "dignitary" status equal to that of the 50 states, Petitioners' "comity" concerns would be entirely irrelevant.

III. ALTERNATIVE GROUNDS

The dismissal of the Amended Complaint must be affirmed on several additional or alternative grounds. Petitioners' claim is barred by the political question doctrine, by their lack of standing, and by the longest conceivably applicable statute of limitations. Dismissal must also be affirmed based on the Amended Complaint's failure to provide a "short and plain statement of the claim showing that the pleader is entitled to relief" against Deutsche Bank, *see* Fed. R. Civ. P. 8(a). All of these issues were raised and preserved by Deutsche Bank below, and all must be considered as grounds to affirm the dismissal of Petitioners' claim. At a minimum, these distinctive defenses complicate both the factual and legal issues presented, making this case a poor candidate for certiorari.

CONCLUSION

Petitioners do not contend that this Court must intervene to resolve a split of authority among the Courts of Appeals. The Petition does not raise any substantial federal question. Petitioners' jurisdictional argument is plainly incorrect, and any argument regarding the merits of Petitioners' underlying claim has not been preserved for this Court's review.

For the reasons set forth above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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